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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 904

A. M. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, FOR ESTATE OF JEANETTA BURGESS, NEE TIGER, DECEASED CREEK, ROLL NO. 5069, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–22) is reported in 42 B. T. A. 958. The opinion of the Circuit Court of Appeals (R. 54–59) is reported in 123 F. (2d) 787.

JURISDICTION

The judgment of the court below was entered on November 11, 1941. (R. 60.) The petition for

a writ of certiorari was filed on January 27, 1942. The jurisdiction of this Court is predicated upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a restricted full-blood Creek Indian, who died on January 10, 1935, had an interest in her restricted property subject to the federal estate tax.

(2) Whether the estate of the decedent is otherwise exempt from the federal estate tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendices, *infra*, pp. 12–20.

STATEMENT

The facts as stipulated by the parties and as found by the Board of Tax Appeals are as follows:

The petitioner is the Superintendent of the Five Civilized Tribes and has under his supervision and jurisdiction affairs of the estate of the decedent herein, Jeanetta Burgess, nee Tiger; he is the representative of the Secretary of the Interior who is the fiduciary of the estate of the decedent and required to return and pay such taxes as may be due from the estate (R. 14). The decedent was a full-blood Creek Indian enrolled opposite Roll No. 5069. At the time of her death on January 10, 1935, she was under full restric-

tions as to all real and personal property (R. 15), and was the owner of 160 acres of land in Creek County, Oklahoma, which had been allotted to her (by deeds bearing date of November 10, 1903 (R. 35–38)) under an agreement between the United States and the Creek Tribe of Indians, dated March 8, 1900, ratified by Act of Congress March 1, 1901, c. 676, 31 Stat. 861, and by the Creek Nation on May 25, 1901 (R. 15, 35–39). That tract of land was at the time of the decedent's death and still is fully restricted and cannot be sold, leased, or otherwise encumbered without the approval of the Secretary of the Interior (R. 6).

On March 13, 1912, the decedent entered into an oil and gas lease covering the tract of land for a period of ten years or as long thereafter as oil and gas might be produced in paying quantities. This lease was approved by the Secretary of the Interior on June 29, 1912. The first royalties under this lease were received for the decedent by the Superintendent of the Five Civilized Tribes in 1915. The lease is still producing in paying quantities and the royalties therefrom are still paid to the Superintendent of the Five Civilized Tribes (R. 15–16).

During the years 1917, 1918, and 1919, the Secretary of the Interior purchased for the decedent Liberty Loan and Victory bonds of a face value of $264,800. At the time of her death there were credited to her account Liberty Loan bonds and Treasury bonds of a face value of $214,800,

which had a then fair market value of $227,243.41 (R. 16). She also had a cash credit of $4,754.89, with the Superintendent of the Five Civilized Tribes (R. 16).

The income from decedent's restricted allotment, as well as the bond and open account interest, was credited to her account with the Superintendent of the Five Civilized Tribes and disbursed under supervision of the Secretary of the Interior. The greater portion of decedent's funds was deposited by the Superintendent of the Five Civilized Tribes with the Treasury of the United States and the balance of her funds was deposited with banks. Decedent had the use of such funds from her account with the Superintendent of the Five Civilized Tribes under departmental supervision in the purchase of personal property for her. Title to personal property purchased, other than clothing, etc., was taken on a restricted bill of sale in the name of the United States for the use and benefit of the decedent. All investment problems concerning the decedent's restricted funds were handled by the Superintendent of the Five Civilized Tribes under departmental supervision (R. 16).

Total royalties paid for the decedent's account, up to the date of her death, under the oil and gas lease amounted to $513,491.30. During this period the decedent's account was also credited with interest on bonds amounting to $123,562.74, and

interest on her cash balance with the Five Tribes agency amounted to $27,312.71 (R. 16–17).

On August 26, 1931, the decedent executed an instrument purporting to be her last will and testament. This will was declared invalid by the United States District Court for the Eastern District of Oklahoma on March 5, 1938, on the ground of incompetency of attesting witnesses. The decree of the District Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit on April 11, 1939 (103 F. (2d) 503) (R. 17). On June 30, 1939, the County Court of Seminole County, Oklahoma, entered a decree determining the heirs of decedent. These were her husband, seven living children, three grandchildren, and the wife of a deceased son. The husband and each of the seven living children were given a one-tenth interest in the estate and the grandchildren and the wife of the deceased son were each given a one-twentieth interest in the estate. All of the heirs are full-blood Indians and were at the time of decedent's death, and still are, fully restricted. Except for the decedent's husband, all the heirs were born subsequent to March 4, 1906. At the time of decedent's death, decedent's husband had 160 acres of land designated tax-exempt under the Act of Congress of May 10, 1938, but none of the other heirs had any land designated as tax-exempt under that Act (R. 17). Since the decedent's heirs are fully restricted, no actual distribution has

been made of the estate of decedent but all of the funds, except such amounts as were disbursed under departmental supervision for the support and maintenance of decedent's heirs, have at all times since the decedent's death been retained by the Superintendent of the Five Civilized Tribes under the supervision of the Secretary of the Interior in trust for the heirs of the decedent. The share to which each heir of the decedent is entitled will be credited to the account of such heir on the books of the Interior Department in the Office of the Superintendent of the Five Civilized Tribes (R. 17–18). From 1914 to the date of her death, the decedent received average monthly payments from the Superintendent of the Five Civilized Tribes of $960. The total amount credited to her account amounted to $444,811.90 (R. 18).

The Commissioner determined that the decedent's estate, consisting of her homestead allotment, the Liberty Loan and Treasury bonds, and cash, was subject to the federal estate tax under the Revenue Act of 1926, as amended, and assessed a deficiency accordingly (R. 9–12). The Commissioner's determination was sustained by the Board of Tax Appeals (R. 22–23), and the Circuit Court of Appeals affirmed (R. 60).

ARGUMENT

There is no occasion for further review, since the decision below is in accord with the decisions

of this Court, and there is no conflict with any decision of any other court.

(a) With respect to the first question there would appear to be no doubt that the decedent had the complete beneficial interest in her property and that that interest was subject to tax when it passed to her heirs at her death. *Superintendent* v. *Commissioner,* 295 U. S. 418; *Choteau* v. *Burnet,* 283 U. S. 691. In the first of these cases it was held that a full-blood Creek Indian had sufficient interest in income derived from his property to be taxable thereon despite the fact that his property and income were restricted. The Court there said (p. 421): "The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." To be sure, the decedent's property was restricted and was managed for her by designated officers, but they acted strictly in a fiduciary capacity. See *Mott* v. *United States,* 283 U. S. 747, 751–752.

(b) Both the Board of Tax Appeals and the Circuit Court found it unnecessary to decide whether any of the treaties with, or statutes relating to, the Creek Indians grant any exemption to those Indians from a direct tax upon their allotments. There is, however, no basis for the petitioner's contention that any of these treaties or statutes grant any present exemption from any tax

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imposed by the Federal Government. In the court below the essence of the petitioner's argument was based upon the contention that an exemption from the estate tax might be found in section 19 of the Act of April 26, 1906 (Appendix B, *infra*), which provided that "all lands upon which restrictions are removed shall be subject to taxation and the other lands shall be exempt from taxation as long as the title remains in the original allottee." This Court has already held that this section was superseded by section 4 of the Act of May 27, 1908,[1] and there would, therefore, appear to be no basis for any argument that the decedent's property was exempt from any form of tax imposed by the Federal Government.[2] However,

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[1] *Superintendent* v. *Commissioner*, 295 U. S. 418, 420–421: "The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat. 137) or May 27, 1908 (35 Stat. 312) is not well founded. The first of these extended restrictions upon the alienation of allotments for twenty-five years unless sooner removed by Congress, and provided: 'Sec. 19 * * * That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.' This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one, which did not contain the quoted provision, but declared: 'Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes * * *.'"

[2] No exemption can be based upon the Original Creek Agreement of 1901, as amended by the Supplemental Creek

neither the Board nor the court below found it necessary to decide this point since even upon the assumption that the decedent's property was exempt from a direct tax, it is clear that such an exemption would not extend to the estate tax which is a transfer tax rather than a tax upon property. *U. S. Trust Co.* v. *Helvering,* 307 U. S. 57; *Plummer* v. *Coler,* 178 U. S. 115; *Greiner* v. *Lewellyn,* 258 U. S. 384; cf. *Knowlton* v. *Moore,* 178 U. S. 41.

There is no merit to petitioner's suggestion (Pet. 3) that the decision below conflicts in principle with *Heckman* v. *United States,* 224 U. S. 413; *Mullen* v. *United States,* 224 U. S. 448; *Choate* v. *Trapp,* 224 U. S. 665; *English* v. *Richardson,* 224 U. S. 680; *Carpenter* v. *Shaw,* 280 U. S. 363; *Superintendent* v. *Commissioner,* 295 U. S. 418; and *United States* v. *Santa Fe Pacific R. R. Co.,* No. 23, this Term, decided December 8, 1941.

Choate v. *Trapp* and *English* v. *Richardson* both involved *direct* taxes imposed by a state upon Indian allotments in clear violation of the exemption granted by the Original and Supplemental Creek Agreements. But, as has been pointed out

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Agreement of 1902, since any exemption flowing from those agreements expired twenty-one years from the date of the allottee's deeds. See Section 16 of the Supplemental Creek Agreement, Appendix B, *infra*, p. 16. The deeds of the decedent herein bore date of November 10, 1903 (R. 35–38). The decedent died on January 10, 1935 (R. 15).

above (footnote 2), any exemption flowing from those agreements expired long prior to the death of the decedent herein. Furthermore, questions of state power to tax restricted Indian property were regarded as involving problems of the immunity of federal instrumentalities from state taxation. See *Choteau* v. *Burnet,* 283 U. S. 691, 696. Such problems are of course not present in the instant case.

Carpenter v. *Shaw* similarly involved a direct tax imposed by a state on allotments of Choctaw Indians, in violation of the Atoka agreement with the Choctaw and Chickasaw Tribes embodied in Section 29 of the Act of June 28, 1898, ratified August 24, 1898, c. 517, 30 Stat. 495.

The *Heckman, Mullen,* and *Santa* Fe cases were not tax cases at all and enunciated no principles at variance with those applied by the court below.

We recognize that this case involves the estate of a ward of the Government and for that reason we would be slow to oppose certiorari in a doubtful situation, but we think that the decision below is correct and does not call for review by this Court.

CONCLUSION

The decision below is correct. There is no conflict with any decision by this or any other Court.

The petition should be denied.

Respectfully submitted.

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